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LETTER DATED 13 FEBRUARY 1993 FROM THE CHARGE D'AFFAIRES A.I. OF THE PERMANENT MISSION OF IRAQ TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

On instructions from my Government, I should like to transmit herewith a letter dated 12 February 1993 from Mr. Mohammed Said Al-Sahaf, Minister for Foreign Affairs of the Republic of Iraq, concerning decision No. 16 of the Governing Council of the United Nations Compensation Commission (S/AC.26/1992/16).

I should be grateful if you would have this letter and its annex circulated as a document of the Security Council and also brought to the attention of the representatives of the States members of the Security Council.

(Signed) Adnan MALIK
Chargé d'affaires a.i.

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Annex

Letter dated 12 February 1993 from the Minister for Foreign Affairs of Iraq addressed to the President of the Security Council

I have the honour to set forth Iraq's position on an important and serious question relating to decision No. 16 (S/AC.26/1992/16) taken by the Governing Council of the United Nations Compensation Commission at its eighth session, held at Geneva from 14 to 18 December 1992, and relating to the imposition of interest on compensation.

I wish, first of all, to cite the text of paragraph 16 of Security Council resolution 687 (1991), which defines the liability of Iraq for the payment of compensation as follows:

> "Iraq ... is liable under international law for any direct loss, damage, including environmental damage ..."

This provision means that Iraq's liability for the payment of compensation is a liability limited by the explicit text of the above-mentioned paragraph and by the legal definition of Iraq's liability for compensation set forth therein.

Article 31 of decision No. 10 (S/AC.26/1992/10) taken by the Governing Council of the United Nations Compensation Commission on 26 June 1992 affirms that fact when it states that Commissioners shall take into account paragraph 16 of Security Council resolution 687 (1991) when considering claims for compensation, as is clear from the text below, inasmuch as the text states:

> "In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions ..."

Security Council resolution 687 (1991) and 692 (1991) and the report of the Secretary-General of the United Nations contained in document S/22559 and dated 2 May 1991 are quite explicit in defining Iraq's liability for compensation determined within the framework of a specific proportion to be deducted from Iraq's petroleum revenues under the relevant Security Council resolutions, a proportion not to be exceeded in any circumstances according to the relevant resolution. In addition, the limited character of the compensation is also narrowed down as relating to direct damage only. This means that the resolution rules out all other kinds of damage that fall within the category of indirect damage, including interest, which does not, in any event, constitute direct damage.

The duties and functions of the United Nations Compensation Commission were again clearly and carefully described in the report of the Secretary-General of the United Nations and stated in paragraph 20 thereof, which reads as follows:

"The Commission is not a court or an arbitrary tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims ..."

This means that the functions of the United Nations Compensation Commission through its "principal organ", namely, the Governing Council, are defined as follows:

1. Fact-finding in the examination of claims;

2. Verification of the validity of claims;

3. Evaluation of losses (as stipulated in the Security Council resolution, i.e., direct losses);

4. Assessment of payments;

5. Resolution of disputed claims;

6. Determination of the level of contribution to the Fund.

Consequently, the Governing Council is restricted to these functions, which are defined in Security Council resolution 692 (1991), which endorses the report of the Secretary-General of the United Nations under consideration.

This means that the Governing Council of the Compensation Fund, as an executive organ having its functions defined as above, has no right or power to add any new financial liability to those imposed on Iraq so that that liability exceeds direct damage or loss.

The omission of any mention of the question of interest in Security Council resolution 687 (1991) was deliberate, and the legal liability of Iraq was defined in a way that rules out any grounds for broadening its interpretation so as to give rise to additional liability for Iraq that is not specified in Security Council resolutions. The Security Council, through the numerous resolutions that it adopted on the Gulf crisis, made no reference to the question of interest, in spite of its importance and the very great sums entailed. This is confirmed by the Secretary-General of the United Nations reference in paragraph 28 of his above-mentioned report:

"It is to be anticipated that the value of claims approved by the Commission will at any given time far exceed the resources of the Fund. It will, therefore, be incumbent upon the Commission to decide on an allocation of funds and a procedure for the payment of claims. It is recommended that the Governing Council establish criteria for the allocation of funds, taking into account the size of claims, the scope of the losses sustained by the country concerned and any other relevant factors. In this connection, it might be necessary to distinguish between Kuwait, on the one hand, and other countries on the other hand. As far as the payment of claims is concerned, it follows from the

consolidation of the claims and their filing by individual Governments that payments would be made exclusively to Governments. Individual Governments will be responsible for the appropriate distribution to individual claimants. The Governing Council should establish further guidelines regarding the payment of claims, for example, whether claims should be paid in full or whether percentages should be paid. In the latter case, the unsatisfied portions of the claims will remain as outstanding obligations."

It is apparent from this paragraph that, whatever the financial input into the Fund, it will not be sufficient for all the compensation in view of the overwhelming number of claims and that the rules of justice and fairness dictate following a regime of limited compensation to meet most, if not all, of the claims. The conclusion arrived at by the Secretary-General of the United Nations to the effect that the unsatisfied portions of the claims should remain as outstanding obligations was approved by Security Council resolution 692 (1991). This conclusion settles the question of interest by ruling it out, and, consequently, any course that conflicts with the provisions of the pertinent Security Council resolutions and reports constitutes a violation of these provisions.

We should also like to point out that the Security Council, when referring in paragraph 19 of resolution 687 (1991) to determination of the appropriate level of Iraq's contribution to the Fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq, requested the Secretary-General of the United Nations to suggest a figure "taking into account the requirements of the people of Iraq, Iraq's payment capacity ... taking into consideration external debt service, and the needs of the Iraqi economy ...".

In paragraph 13 of his report, the Secretary-General of the United Nations requested the Governing Council of the Fund, when carrying out the task of determining the appropriate level of Iraq's contribution to the Fund in accordance with the criteria laid down in paragraph 19 of Security Council resolution 687 (1991) to "consider the probable levels of future oil export revenues of Iraq ... and the needs for reconstruction and development in the country". It thus emerges from the above provisions that the principle that must be followed in such a case is a regime of limited compensation such as has been adopted by the international community in numerous international agreements and treaties. For example, the treaty concluded on 28 November 1950 between Italy and France set the compensation to be paid by Italy to France at a fixed amount of 357 million francs, while the actual damage had been estimated in 1948 at 400 billion francs. We may also mention the peace treaties concluded between Japan, on the one hand, and, on the other hand, Burma in 1954, the Philippines in 1956, Indonesia in 1958 and Viet Nam in 1959, which specified fixed amounts with a ceiling to cover compensation for damage that had occurred. Contemporary instances of the adoption of a limited compensation regime include the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, as well as the amended Warsaw Convention of 1929 and many other such agreements. None of them

contain a provision for interest. Of course, the State on which payment of compensation was imposed under the above-mentioned treaties were parties to the negotiations that led up to them. Iraq has been deprived of this right.

There is also another set of considerations that point quite clearly to the necessity of not imposing the requirement of interest on compensation, including the following:

1. The amount of compensation is a lump sum, and interest or other charges cannot be imposed on it.

2. The damage is not quantitatively determined. This means that the compensation is removed from the sphere of interest claims.

3. The condition of payment of an amount of compensation that is not yet due also rules out the computation of interest on such compensation, because interest can be computed only on a monetary debt on which payment is due and whose amount is known, as we have explained.

4. The timing of the payment of compensation is by schedules to be prepared by the Commission. Consequently, it cannot be said that there are arrears of payment that necessitate the imposition of interest on such arrears, because interest is not imposed unless there is a delay occasioned by the debtor, whereas Iraq has not occasioned any delay in the payment of the compensation. The delay was caused by the payment schedule.

5. One of the definite rules of international law is that interest cannot be imposed on compensation, because interest is itself compensation, and there cannot be compensation assessed on compensation.

6. The imposition of interest on the amount of compensation would increase it to a point beyond reason, which is incompatible with the norms of justice and fairness and would lead to arbitrariness and prejudice to the needs of the people of Iraq and its right to life and development. That would be in conflict with Security Council resolutions and the considerations set forth in paragraph 19 of resolution 687 (1991), which states that Iraq's payment capacity must be taken into consideration in the determination of the proportion of Iraq's contribution to the financing of the Fund.

7. Inasmuch as the amounts of compensation were not determined as a result of negotiation or as a result of a ruling of a court or arbitral tribunal but determined by the Compensation Commission, which is a "political organ", the decision to impose interest on the amount of compensation is a matter that lies outside the mandate of the Commission.

It is clear from the above and from a reference to paragraphs 16 and 17 of Security Council resolution 687 (1991) and the report of the Secretary-General of the United Nations approved by Security Council resolution 692 (1991) that the condition of interest is not mentioned and that there is no intention to impose it on the compensation. If there had been any

such intention or any probability thereof, we should have found some reference, however rudimentary, to this in the Security Council resolutions adopted on the matter. The adoption by the Governing Council of the Compensation Fund of a decision to impose interest on compensation is a measure that conflicts with the provisions of the Security Council resolution and, at the same time, with legal principles and the trend followed in the peace treaties following the Second World War. It also conflicts fundamentally with the principles of justice and fairness. On this basis, the Government of the Republic of Iraq calls upon the Security Council to take the necessary steps to abrogate this decision and reaffirm compliance with the Council resolutions adopted in this matter, without any overextension in the area of compensation provisions such as would render implementation impossible and beyond the scope of the resolutions adopted on the subject.

(Signed) Mohammed Said AL-SAHAF
Minister for Foreign Affairs of
the Republic of Iraq